FOR ARGUMENT

Supreme Court, U. S.
FILED
MAR 28 1979
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-625

CECIL D. ANDRUS, Secretary of the Interior, and JAMES T. McINTYRE, JR., Director, Office of Management and Budget,

Petitioners

v.

SIERRA CLUB, ET AL.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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BRIEF OF THE WILDERNESS SOCIETY AS AMICUS CURIAE

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TABLE OF CONTENTS

	Page
INTEREST OF AMICUS	1
QUESTIONS PRESENTED	3
INTRODUCTION AND SUMMARY OF ARGUMENT	4
ARGUMENT	
I. Appropriations Requests May Be Proposals On Major Federal Actions Requiring An Environmental Impact Statement	7
A. Appropriations Requests Are "Proposals"	7
B. Appropriations Requests Which Would Substantially Change Funding or Policy on Environmentally Significant Programs Constitute "Proposals for Major Federal Action"	12
II. CEQ's New Regulation Excluding "Appropriations" From The Reach of § 102(2)(C) is Entitled To No Deference	16
III. The Court of Appeals' Holding Will Not Interfere With The Current Budget Process or The President's Exercise of His Executive Functions	22
A. Timing and Practicability	23
B. Confidentiality	27
C. Separation of Powers	30
IV. Congressional Policy Would Be Frustrated By A Blanket Exemption of The Budget Process from NEPA's Procedural Requirements	32
CONCLUSION	35

TABLE OF AUTHORITIES

Cases Page

Aberdeen and Rockfish R.R. v. *S.C.R.A.P.*, 422 U.S. 289 (1975) 11
Administrator, FAA v. *Robertson*, 422 U.S. 255 (1975) 28
Alaska v. *Carter*, 12 E.R.C. 1486 (D. Ala. 1978) 31
Aluli v. *Brown*, 437 F.Supp. 602 (D. Hawaii 1977) 17
American Trucking Ass'n v. *Atchison, Topeka & Santa Fe Railway*, 387 U.S. 397 (1967) 18, 19
Appalachian Mountain Club v. *Brinegar*, 394 F. Supp. 105 (D. N.H. 1975) 17
Atchison, Topeka & Santa Fe Railway Co. v. *Callaway*, 431 F.Supp. 722 (D. D.C. 1977) 31
Automobile Club v. *C.I.R.*, 353 U.S. 180 (1957) 19
Businessmen v. *D.C. City Council*, 339 F.Supp. 793 (D. D.C. 1972) 14
Calvert Cliffs' Coordinating Committee v. *A.E.C.*, 449 F.2d 1109 (D.C. Cir. 1971) 8, 24
Carolina Action v. *Simon*, 389 F.Supp. 1244, (M.D. N.C.) *aff'd* 522 F.2d 295 (4th Cir. 1975) 17
Chicago & Southern Air Lines v. *Waterman S.S. Corp.*, 333 U.S. 103 (1948) 11
Chisholm v. *FCC*, 538 F.2d 349 (D.C. Cir. 1976), *cert. denied*, 429 U.S. 890 (1976) 19
City of Boston v. *Volpe*, 464 F.2d 254 (1st Cir. 1972) 8, 9
Comm. for Nuclear Responsibility v. *Seaborg*, 463 F.2d 796 (D.C. Cir. 1971) 30
Concerned About Trident v. *Rumsfeld*, 555 F.2d 817 (D.C. Cir. 1976) 23
County of Suffolk v. *Sec'y of Interior*, 526 F.2d 1368 (2d Cir. 1977) 8
Dandridge v. *Williams*, 397 U.S. 471 (1970) 13, 32
Environmental Defense Fund v. *Corps of Engineers*, 324 F.Supp. 878 (D. D.C. 1971) 14
Environmental Defense Fund v. *Corps of Engineers*, 325 F.Supp. 749 (E.D. Ark. 1971) 14

TABLE OF AUTHORITIES—Continued

Page

Environmental Defense Fund v. *Corps of Engineers*, 492 F.2d 1123 (5th Cir. 1974) 24, 25
Environmental Defense Fund v. *Tenn. Valley Authority*, 468 F.2d 1164 (6th Cir. 1972) 17
Environmental Protection Agency v. *Mink*, 410 U.S. 73 (1973) 29
Espinoza v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86 (1973) 18
Flint Ridge Development Co. v. *Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776 (1976) 9, 23, 24, 25
General Electric Co. v. *Gilbert*, 429 U.S. 125 (1976) 17, 18
Goose Hollow Foothills League v. *Romney*, 334 F.Supp. 877 (D. Or. 1971) 31
Greater Boston Television Corp. v. *FCC*, 444 F.2d 841 (D.C. Cir. 1970) *cert. denied*, 403 U.S. 923 (1971) 19, 21
Gulf Oil Co. v. *Simon*, 502 F.2d 1154 (Temp. Em. Ct. of Appeals 1974) 23
Jones v. *District of Columbia Revelopment Land Agency*, 499 F.2d 502 (D.C. Cir. 1974), *cert. denied*, 423 U.S. 937 (1975) 10, 15
Kleppe v. *Sierra Club*, 427 U.S. 390 (1976) 11, 12, 16
Lathan v. *Brinegar*, 506 F.2d 677 (9th Cir. 1974) (en banc) 8
Minnesota Public Interest Research Group v. *Butz*, 498 F.2d 1314 (8th Cir. 1974) (en banc) 15
N.L.R.B. v. *Sears, Roebuck & Co.*, 421 U.S. 132 (1975) 4
Natural Resources Defense Council, Inc. v. *Morton*, 458 F.2d 827 (D.C. Cir. 1972) 9, 10, 25
Renegotiation Board v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168 (1975) 29
Sanford's Estate v. *C.I.R.*, 308 U.S. 39 (1939) 18
Scientists' Inst. for Public Information, Inc. v. *Atomic Energy Comm'n*, 481 F.2d 1079 (D.C. Cir. 1973) 16, 25

TABLE OF AUTHORITIES—Continued

Page

Sierra Club v. *Froehlke*, 359 F.Supp. 1289 (S.D. Tex. 1973), modified on other grounds, 499 F.2d 982 (5th Cir. 1974) 17
Sierra Club v. *Morton*, 405 U.S. 727 (1972) 13
Skidmore v. *Swift Co.*, 323 U.S. 134 (1944) 19
State of Louisiana v. *F.P.C.*, 503 F.2d 844 (5th Cir. 1974) 25
Tennessee Valley Authority v. *Hill*, 98 S.Ct. 2279 (1978) 34
Texas Comm. On Natural Resources v. *Bergland*, 573 F.2d 201 (5th Cir.), *cert. denied*, 47 U.S. L.W. 3332 (U.S. Nov. 13, 1978) 23
United States v. *S.C.R.A.P.*, 412 U.S. 669 (1973) .. 9
Udall v. *Tallman*, 380 U.S. 1 (1965) 17
Vermont Yankee Nuclear Power Corp. v. *Natural Resources Defense Council, Inc.*, 98 S.Ct. 1197 (1978) 10, 19
Virginians for Dulles v. *Volpe*, 541 F.2d 442 (4th Cir. 1976) 15
Zenith Radio Corp. v. *United States*, 98 S.Ct. 2441 (1978) 18

Statutes and Rules

Budget and Accounting Act of 1921, 31 U.S.C. § 1 *et seq.*:

Section 214, 31 U.S.C. § 22 31
Section 206, 31 U.S.C. § 15 28
Section 201(a), 31 U.S.C. § 11 31

Council on Environmental Quality, Guidelines, 40 C.F.R. (1977):

Section 1500.7 24
Section 1500.1(a) 8
Section 1500.5(a)(1) 17
Section 1500.1(b) 16

TABLE OF AUTHORITIES—Continued

Page

Freedom of Information Act, 5 U.S.C. § 552:

5 U.S.C. § 552(b) 27, 29
5 U.S.C. § 552(b)(5) 27, 29
5 U.S.C. § 552(b)(3) 28

National Environmental Policy Act of 1969, 42 U.S.C. § 4321 *et seq.*:

Section 102, 42 U.S.C. § 4332 27
Section 102(2)(B), 42 U.S.C. § 4332(2)(B) .. 16
Section 102(2)(C), 42 U.S.C. § 4332(2)(C) .. *passim*
Section 102(a)(H), 42 U.S.C. § 4332(2)(H) .. 16
Section 203, 42 U.S.C. § 4343 16

Miscellaneous

Council on Environmental Quality, Rules and Regulations, 43 Fed. Reg. (Nov. 1978):

Page 55990-91, § 1500.1(b), (c) 8, 17
Page 55995, § 1501.8 21
Page 56001-02, § 1506.8 ..... 21, 26
Page 56003, § 1507.3(c) 21, 29
Page 55992-93, § 1501.5 24
Page 55989 (CEQ explanation) 20
Page 55988 (CEQ explanation) 26

43 Fed. Reg. 25230, 25245 (June 1978) (CEQ Proposed Rules) 16, 20
36 Fed. Reg. 19344 (Oct. 1971) (Dep't of Int'r. Manual) 17
36 Fed. Reg. 7724 (Apr. 1971) (1971 CEQ Guidelines) 16, 17
Executive Order No. 11514, 35 Fed. Reg. 10737 (1970) 16
6 CEQ Ann. Rep. (1975) 15
S. Rep. No. 91-296, 91st Cong., 1st Sess. (1969) 13
Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969) 28

TABLE OF AUTHORITIES—Continued

Page

Testimony of William A. Turnage Before the Senate Appropriations Comm. on the Department of Interior and Related Agencies (March 6, 1979) 32-33
Webster's New World Dictionary 8

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INTEREST OF AMICUS *

The Wilderness Society ("the Society") is a tax-exempt nation-wide nonprofit conservation organization. Its members, numbering over 70,000, frequently use national park lands, wildlife refuges, lands managed by the Bureau of Land Management, and Congressionally desig-

* Pursuant to Supreme Court Rule 42, written consent to the filing of this Brief has been obtained from counsel for all parties, and the letters manifesting such consent have been filed with the Clerk of the Court.

nated wilderness areas for recreational purposes. During the 41 years of its existence, the Wilderness Society has worked to secure the preservation of original wilderness areas in the United States and to educate the public to the values and uses of wilderness as a national natural resource. To these ends, the Society publishes a quarterly journal, engages in field activities to discover and monitor the condition of wilderness areas, and provides testimony and information concerning wilderness and related issues to legislative bodies, including the Congress. The Society also participates in rulemaking and adjudicatory proceedings before federal agencies and frequently participates in litigation of environmental issues in the Federal courts.

Wilderness areas provide an opportunity for thousands of Americans to enjoy the unique solitude and splendor of an environment untouched by civilization, while at the same time affording havens for wildlife and for plant life and ecosystems to develop and be studied in their natural condition. Wilderness is by definition among the most fragile of our Nation's resources—easy to lose but requiring centuries to rebuild. The National Environmental Policy Act of 1969 (NEPA) is thus of critical importance in assuring that federal decisions affecting the ever-diminishing areas of true wilderness are made with full awareness of the environmental values that hang in the balance.

NEPA represents a major congressional commitment to enhancing the quality of the nation's environment. The chief means chosen to enforce this substantive commitment is the procedural requirement of § 102(2)(C) of the Act, 42 U.S.C. § 4332(2)(C), which directs all federal agencies "to include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment" a written statement describing the

environmental impact of the proposed action and alternatives to it. A vitally important question presented in this case is whether an agency's budget request reflecting a marked change in funding or reevaluation of policy on environmentally significant programs is a "recommendation on proposals for legislation [or] other major Federal actions significantly affecting" the environment so as to require the preparation of an environmental impact statement.

Resolution of this issue will determine whether (and to what extent) Federal decisions concerning the funding of programs of major environmental significance will receive the benefit of the informed analysis and considered judgment contemplated by NEPA. As we will demonstrate below, any attempt totally to exclude agency funding requests from the reach of § 102(2)(C) flies in the face of the plain language of that section and NEPA's policy mandating informed decision-making regarding the environmental consequences of federal action. The government's extreme position, based as it is largely on purported administrative convenience, prompts this amicus brief.

QUESTIONS PRESENTED

The government's statement of the first issue does not fairly characterize the question presented by the Court of Appeals' holding. The Court of Appeals did not hold that all annual budget requests for existing federal programs affecting the environment must be accompanied by an environmental impact statement (EIS). Indeed, it reversed the District Court's holding to that effect and concluded that § 102(2)(C) required an EIS only when an agency's budget proposes a significant change in the status quo or "ushers in a considered programmatic course following a programmatic review" of ongoing programs. *Sierra Club* v. *Andrus*, 581 F.2d 895, 903 (D.C. Cir.

1978).[1] Thus, the question presented here is whether an agency's budget request proposing a significant change in the status quo or reflecting a reevaluation of policy on environmentally significant programs is a "proposal[] for legislation [or] other major Federal action[]" that must be accompanied by an EIS.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Under NEPA, an EIS is required for any agency proposal for legislation or other major federal action significantly affecting the environment. 42 U.S.C. § 4332 (2) (C)[3]. An agency's budget request that would substantially change funding of environmentally significant programs or reflect a reevaluation of Department policy regarding such programs is a "proposal" for "major Federal action" within the meaning of this section. Such a request therefore must be accompanied by an EIS.

I. An agency's request to the Office of Management and Budget ("OMB") for an annual budget is a "proposal" within the meaning of NEPA. To hold otherwise is contrary to NEPA's plain language and would vitiate the Act's undoubted purpose of requiring serious consideration of environmental consequences prior to the final stages of agency decision-making. The government's emphasis on the agency's inability to make final budget decisions is misplaced, since NEPA and this Court's interpretation of it require that a mere *proposal* for action be accompanied by an EIS.

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[1] Given the limited scope of the Court of Appeals holding, the absence of any significant conflict in the circuits on the question presented, and the change in applicable regulation that has occurred since the decision below, see Part II, *infra*, the Court may wish to consider either dismissing the writ of certiorari as improvidently granted or remanding the case to the Court of Appeals for it to consider the effect of the intervening change in regulation. See *N.L.R.B.* v. *Sears, Roebuck & Co.*, 421 U.S. 132, 162-66, 95 S. Ct. 1504, 1522-23 (1975).

[2] This amicus Brief addresses only the first question raised in the petition for certiorari. The Wilderness Society does not address the second question on which this Court granted certiorari: whether the Court of Appeals correctly upheld the District Court's declaratory judgment requiring that OMB prepare regulations to assist other agencies in determining when an EIS is required. While amicus agrees with Respondents that OMB is for some purposes an "agency" within the meaning of NEPA, whether OMB, CEQ or the agencies themselves promulgate regulations relating to the circumstances under which a budget request must be accompanied by an EIS is of less importance to the Wilderness Society than that the obligation be recognized and fulfilled.

[3] Section 102(2)(c), 42 U.S.C. § 4332, provides as follows:

> The Congress authorizes and directs that, to the fullest extent possible: (1) the policies, regulations, and public laws of the United States shall be interpreted and administered in accordance with the policies set forth in this chapter, and (2) all agencies of the Federal Government shall—
>
> * * * *
>
> (C) include in every recommendation or report on proposals for legislation and other major Federal actions significantly affecting the quality of the human environment, a detailed statement by the responsible official on—
>
> (i) the environmental impact of the proposed action,
>
> (ii) any adverse environmental effects which cannot be avoided should the proposal be implemented,
>
> (iii) alternatives to the proposed action,
>
> (iv) the relationship between local short-term uses of man's environment and the maintenance and enhancement of long-term productivity, and
>
> (v) any irreversible and irretrievable commitments of resources which would be involved in the proposed action should it be implemented.
>
> Prior to making any detailed statement, the responsible Federal official shall consult with and obtain the comments of any Federal agency which has jurisdiction by law or special expertise with respect to any environmental impact involved. Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies, which are authorized to develop and enforce environmental standards, shall be made available to the President, the Council on Environmental Quality and to the public as provided by section 552 of Title 5, and shall accompany the proposal through the existing agency review processes[.]

Where an agency's budget proposes marked changes in funding or policy for environmentally significant programs, the proposal is one for "major Federal action." Under the applicable caselaw and regulations, a federal agency's decision substantially to shift resources or revise its programs with the purpose or effect of significantly affecting the environment is a "proposal for major Federal action" and must be accompanied by an environmental impact statement.

II. The new Council on Environmental Quality ("CEQ") regulation excluding appropriations from the definition of "legislation" is entitled to no deference from this Court on the issue of statutory interpretation. While generally CEQ's Guidelines and Regulations are entitled to substantial deference, the CEQ's contradiction of its prior contemporaneous and longstanding interpretation, the unusual circumstances of the promulgation of this regulation, and the inadequacy of the reasons given by CEQ in support of the change deprive this new interpretation of the respect it might otherwise command.

III. The limited EIS requirement enunciated by the Court of Appeals will neither disrupt the budget process nor invade the province of other branches of government. The requirements of § 102(2)(C) are to be reasonably construed in the context of the particular governmental decision process involved. CEQ's new regulations themselves manifest the flexibility attainable under NEPA, providing for a streamlined impact statement procedure for drafts accompanying legislative proposals and permitting the nondisclosure to the public of material warranting confidential treatment. To the extent that an appropriation EIS contained material exempt from public disclosure, NEPA itself contemplates that it may be withheld from disclosure. Finally, preparation of the EIS itself entails no restriction on the President's ability to receive advice from his Cabinet.

IV. NEPA's policy of assuring that major federal decisions be informed with a consideration of any significant environmental consequences would be seriously frustrated by affording the budgetary process a blanket exemption from NEPA. While agency budget submissions currently may not be oriented towards their environmental consequences, this does not excuse judicial enforcement of the clear NEPA mandate that all levels of federal decision-making reflect consideration of such factors. The courts' proper constitutional role is to enforce the statute as written. Agencies must look to Congress, not the courts, to rewrite the statute.

ARGUMENT

I. Appropriations Requests May Be Proposals On Major Federal Actions Requiring An Environmental Impact Statement.

As indicated above, an environmental impact statement must be prepared whenever an agency makes a report or recommendation on a proposal for legislation or other major federal action significantly affecting the environment. There is no dispute that an agency's budget request is a "recommendation" or that the programs at issue "significantly affect" the environment. The controversy focuses instead on whether a budget request is a "proposal" for either "legislation" or "major Federal action." As we will demonstrate, an agency's budget request is a "proposal" that, in some instances, is for "major Federal action" within the meaning of § 102(2)(C).

A. *Appropriations Requests Are Proposals.*

Under any common sense meaning of the word "proposal" used in § 102(2)(C), an agency's request for a budget is a "proposal." The budget request is a concrete and detailed plan which the agency, as its proponent, "present[s] for acceptance or rejection" to OMB and to

the President. *See* Webster's New World Dictionary at 1140. This interpretation of the word "proposal" is supported by NEPA's statutory purpose.

As numerous courts have recognized, the primary purpose of NEPA is to require federal agencies, before making final decisions or recommendations, carefully to consider the impact of these decisions from an environmental perspective. *See, e.g. Lathan* v. *Brinegar*, 506 F.2d 677, 693 (9th Cir. 1974) (en banc); *County of Suffolk* v. *Sec'y of Interior*, 562 F.2d 1368, 1375, 1380 (2d Cir. 1977); *City of Boston* v. *Volpe*, 464 F.2d 254, 257 (1st Cir. 1972); *Calvert Cliffs' Coordinating Committee, Inc.* v. *A.E.C.*, 449 F.2d 1109, 1114 (D.C. Cir. 1971). Thus, under § 102(2)(C), an environmental impact statement is required prior to any final decision, whenever an agency recommends or reports on a proposal for legislation or other major federal action. This requirement is designed to "insure that environmental information is available to public officials and citizens before decisions are made and before actions are taken. . . . The NEPA process is intended to help public officials make decisions that are based on understanding of environmental consequences and take actions that protect, restore and enhance the environment." Council on Environmental Quality, Rules & Regulations, 43 Fed. Reg. 55978, 55990-91, § 1500.1(b), (c) (Nov. 1978) ["CEQ Regulations"]. The CEQ Guidelines similarly recognize that NEPA "require[s] agencies to build into their decision process . . . at the earliest possible point . . . careful consideration of the environmental aspects of the proposed action. . . ." 40 C.F.R. § 1500.1(a) ["CEQ Guidelines"].

In the important and difficult process of preparing a national budget, an agency's assessment of the environmental consequences of significant changes in funding for its ongoing environmental programs will provide assistance not only to Congressional decision-makers, but

to OMB and the President as well. Given the enormous responsibilities and power of OMB, and its relatively small staff, NEPA's fundamental purpose—ensuring that all federal agencies and officials undertake decision-making with a view toward "reversing the deterioration of the country's environment," *United States* v. *S.C.R.A.P.*, 412 U.S. 669, 693, 93 S.Ct. 2405, 2419 (1973)—demands that OMB receive the kind of analysis contemplated by § 102(2)(C), lest important environmental considerations be "shunted aside in the bureaucratic shuffle" of annual budget making. *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma*, 426 U.S. 776, 787, 96 S.Ct. 2430, 2538 (1976).

The heart of the government's legal argument rests on its assertion that an agency's budget request to OMB is not a "proposal" under § 102(2)(C) because (1) only the President has authority to submit appropriations requests to Congress under the Budget and Accounting Act, and (2) the agency's ability following its budget submission to OMB to negotiate further with OMB or the President deprives its initial OMB submission of the requisite characteristics of a proposal. These arguments fundamentally misconceive the meaning and purpose of NEPA.

The government's argument would deprive NEPA of its intended ability to ensure that federal decision-makers—including the President and Congress, *Natural Resources Defense Council, Inc.* v. *Morton*, 458 F.2d 827, 833 (D.C. Cir. 1972)—be aware of the environmental consequences of their decisions *before* they become final.[4] *City of Boston* v. *Volpe, supra*, 464 F.2d at 259 (NEPA is con-

[4] The government's argument is also inconsistent with its recognition that the "crucial term 'proposals'" cannot be read out of the Act, "for the obvious reason that the Act was intended to bring environmental considerations into play *before* the action was taken." Brief for the United States at 46 n.34.

cerned with "proposed action, not fait accompli"); *Jones* v. *District of Columbia Redevelopment Land Agency*, 499 F.2d 502, 510-511 (D.C. Cir. 1974). Congress intended no such result, as is apparent on the face of § 102(2)(C), which specifically directs that EISs be submitted to the President and, as the government recognizes, Brief for the United States at 32 n.26, requires preparation of an EIS where an agency proposes "substantive" legislation. Thus, even though Congress alone makes final decisions on legislative proposals (and, in doing so, may consider other proposals not required to be accompanied by an EIS), Congress clearly wished to benefit in its own decision-making from the agency's expert environmental analyses.[5] *NRDC* v. *Morton*, *supra*, 458 F.2d at 833 & nn.11, 12. *See also*, *Vermont Yankee Nuclear Power* v. *Natural Resources Defense Council*, 98 S.Ct. 1197, 1207, 1219 (1978). As the D.C. Circuit held in analogous circumstances, "it is precisely because [one agency] has the power to modify [another agency's] proposals that impact statements accompanying the proposals are necessary. [The] decision on whether to approve the proposals as presented or to modify them may be, and should be, vitally affected by the information contained and the conclusions drawn in [the] impact statement." *Jones* v. *D. C. Redevelopment Land Agency*, *supra*, 499 F.2d at 511.

The government seems to confuse NEPA's requirement that a "proposal" be accompanied by an EIS with the *finality* requirement for judicial review of agency actions more generally embodied in the Administrative Procedure Act, Brief for the United States at 30-31, n.20. NEPA is directed at consideration of environmental issues, not to

[5] Moreover, the statutory requirement that an EIS "accompany the proposal through the existing agency review processes" necessarily contemplates that EISs may be prepared by agencies that lack final authority over the proposal in question. 42 U.S.C. § 4332 (2)(C)

other aspects of agency action. As this Court observed in *Aberdeen & Rockfish R.R. Co.* v. *S.C.R.A.P.*, 422 U.S. 289, 320, 95 S.Ct. 2336, 2355 (1975), "[w]hen agency or departmental consideration of environmental factors in connection with [major federal actions] is complete, notions of finality . . . do not stand in the way of judicial review of the adequacy of such consideration," even though other aspects of the underlying federal action are not or may never be ripe for review. Neither Respondents nor amici seek to require judicial review of an agency's requested budget; rather, they seek to enforce the independent duty that NEPA imposes to produce an EIS to accompany certain budget requests.[6] That duty clearly arises prior to any final decision, and an agency's compliance with this obligation is just as clearly subject to judicial review.

Nor does *Kleppe* v. *Sierra Club*, 427 U.S 390, 96 S.Ct. 2718 (1976), sustain the government's position that no "proposal" is involved here. The District Court in *Kleppe* expressly found that "there was no existing or proposed plan or program on the part of the Federal Government for the regional development of the area described in respondents' complaint," 421 U.S. at 401, 96 S.Ct. at 2726, and this finding was accepted by the Court of Appeals and the Supreme Court. Thus, the issue in *Kleppe* was whether, *prior* to the time that a proposal came into existence, NEPA imposed a judicially enforceable duty to commence preparing an EIS.

[6] Accordingly, the analogy the Government draws, Brief for the United States at 30-31 n.20, to *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103, 112, 68 S. Ct. 431, 436-37 (1948) is not apt. The Court there held that the CAB's orders granting certificates for overseas air transport were not judicially reviewable because such orders were not final without Presidential approval, and that the President's decision was not reviewable because it was a political decision wholly committed to his executive discretion. While *Chicago & Southern* might be relevant if Respondents sought judicial review of the agency's budget request itself or of the President's action with respect thereto, the case is irrelevant to the issues presented here.

Here, by contrast, there is no disagreement that a proposed budget for the Fish & Wildlife Service was in existence and had been submitted by the Department of the Interior to OMB. No guesswork is required to decide whether the agency *would* submit a budget; no "germination" of an idea whose time might never come is involved. *Cf. Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 406, 96 S.Ct. at 2728. The Fish & Wildlife Service's proposed budget was far more than a mere "contemplation" in the agency's decision-making process. *Ibid.* It was a proposal to which the agency was committed as its recommendation for its own budget. While subject to final approval by others, it "define[d] fairly precisely the scope and limits" of proposed agency action, and thus afforded the "factual predicate for the production of an [EIS]." *Kleppe* v. *Sierra Club*, *supra*, 427 U.S. at 402, 96 S.Ct. at 2726-27.

In short, the agency's "formal recommendation or report" on the proposed budget, *cf.* Brief for the United States at 31 n.21, occurs at the time of submission to OMB. An EIS must be prepared at that time if the budget request proposes either "legislation" or "other major Federal action."

B. *Appropriations Requests Which Would Substantially Change Funding or Policy On Environmentally Significant Programs Constitute "Proposals for Major Federal Action."*

The Society agrees with Respondents and the other amici that appropriations requests are "proposals for legislation." In the interests of brevity the Society will confine its argument to whether these "proposals" also are "proposals for major Federal action" so as to require an EIS.[7]

[7] The question presented to both courts below was whether budget requests are "proposals for legislation and other major Federal actions" within the meaning of § 102(2)(C). As Judge MacKinnon recognized in his separate opinion, regardless of whether a request for appropriations is a proposal for "legislation," if it is a proposal for "major Federal action" an EIS may be required. 581 F.2d at 914. Although Judge Leventhal's opinion for the court did not directly address the "major Federal action" language of the statute, the District Court ruled in favor of Respondents on this point, *Sierra Club* v. *Morton*, 395 F. Supp. 1187, 1189 (D.D.C. 1975). Since the judgment below could be sustained on this ground without expanding the relief granted, *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6, 90 S.Ct. 1153, 1156-57 (1970), the Court may appropriately consider whether agency appropriations requests to OMB reflecting major funding or policy changes for environmentally significant and previously authorized programs are "proposals for . . . major Federal actions."

The reasoning of the Court of Appeals would require preparation of an EIS when a federal agency's budget request to OMB proposes substantially to change funding of authorized programs so as to significantly alter their impact on the environment.[8] This is in accord with Congress' clear intent, expressed in the legislative history, that the phrase "major Federal actions" includes "expansion or revision of ongoing programs" that would significantly affect the environment. S.Rep. No. 91-296, 91st Cong., 1st Sess. (1969) at 20. As the District Court noted, budget decisions have a direct and substantial bearing on the staffing, management and maintenance of federal environmental programs. In fact, the environmental consequences of a drastic cut-back in federal resources allocated to such previously authorized programs as wildlife refuge management or federal park land acquisitions can have

[8] See 581 F.2d at 902-03 (routine requests for appropriations distinguished from new action which significantly changes the status quo). Although the Court of Appeals' analysis focused on whether there was a proposal for "legislation," its two-pronged standard for determining when an appropriations EIS is required is equally if not more useful in approaching the question of whether such a proposal is for "major Federal action." The Wilderness Society will concentrate on the proposition that a major change in funding for environmentally significant programs is a "major Federal action," and adopts Respondents' argument that an EIS is also required to accompany a budget request reflecting a considered reevaluation of policy ushering in a programmatic course.

more devastating environmental consequences than the more limited federal construction projects for which EISs have been required.[9]

The government suggests that the environmental consequences of an agency's budgetary decisions can be considered upon preparation of an EIS when budget decisions are "implemented." But such delayed consideration of environmental factors undermines the predecisional thrust of NEPA, for if the money has not been appropriated, the decision may be effectively foreclosed. As Judge MacKinnon recognized, "[w]hen . . . a decision is made to request no funding at all, thus terminating a program . . . such action could plausibly be considered 'major.'" 581 F.2d at 914. The record in this case reflects that the Department of the Interior *contemplated* a severe retrenchment of federal operation and maintenance of wildlife refuges.[10] Had that "contemplation" ripened into a budget request that failed to seek appropriations sufficient for such an authorized and existing program, and had that agency's proposal been adopted,[11] the preclusionary effect at the "implementation" stage (when the government states that an EIS *would* be required) would render the NEPA process a mockery.

[9] *See, e.g., Businessmen* v. *D.C. Council*, 339 F. Supp. 793 (D.D.C. 1972) (urban renewal project); *Environmental Defense Fund* v. *Corps of Engineers*, 324 F. Supp. 878 (D.D.C. 1971) (a canal); *Environmental Defense Fund* v. *Corps of Engineers*, 325 F. Supp. 749 (E.D. Ark. 1971) (a dam).

[10] Plaintiffs' Statement of Material Facts as to Which There Is No Genuine Issue, at 5-6. The importance of full consideration of environmental consequences prior to the agency's budget submission to OMB is highlighted by the fact that these submissions "resemble very closely in nature and form the Justifications for Appropriations which are ultimately sent to Congress for each Bureau and agency." Affidavit of Curtis Bohlen, Deputy Asst. Secretary of Interior for Fish and Wildlife and Parks at 3.

[11] It bears emphasizing that, once a concrete proposal for major federal action significantly affecting the environment is made, the possibility that the proposal will not become effective or will be altered does not detract from its characteristics as a proposal or eliminate the need for compliance with Section 102(2)(C). NEPA necessarily contemplates that some federal proposals will, on consideration of the EIS and comments thereto, be changed or abandoned. *See, Jones* v. *D.C. Redevelopment Land Agency*, 499 F.2d 502, 510-11 (D.C. Cir. 1974). *See also*, 6 CEQ Ann. Rep. 628-32 (1975).

The requirement of an EIS where budget requests reflect significant changes in funding or policy for ongoing programs is not the product of an over-active judicial imagination, as the government suggests, but rather soundly reflects well-established principles drawn directly from NEPA and used by courts and agencies alike to identify "major Federal actions." Thus, for example, it has been held that the Federal Aviation Administration's acquiescence in an expanded use of National Airport, in part by including in its budget request for FY 1972 some $26 million for modernization, constituted "major Federal action" significantly affecting the environment within the meaning of § 102(2)(C) and thus an EIS was required. *Virginians for Dulles* v. *Volpe*, 541 F.2d 442, 445 (4th Cir. 1976). The court explained that the "increased use will have a significant impact on the environment whether existing facilities are retained unchanged or modified," *id.* at 445, and after analyzing the legislative history, concluded that

> Congress wanted the agencies to address environmental consequences not only in considering future projects but also in reviewing their present policies and programs, at least when expanding or revising them.

Virginians for Dulles v. *Volpe*, *supra*, 541 F.2d at 446. *See also, Minnesota Public Interest Research Group* v. *Butz*, 498 F.2d 1314, 1319, 1322 (8th Cir. 1974) (en banc). The holding below also is supported by CEQ's new regulations which define "major Federal action" to

include "new and continuing activities . . . and *connected agency decisions allocating agency resources* to implement a specific statutory program or executive directive." § 1508.18(a), (b)(3) (emphasis added).

The Court of Appeals' standard is quite properly couched in terms sufficiently flexible to match the broad scope of § 102(2)(C), which reflects NEPA's purpose to reach all proposed major federal action, of whatever form, that can have a significant effect on the environment. *See, Scientists' Inst. for Public Information, Inc.* v. *Atomic Energy Comm'n*, 481 F.2d 1079, 1088 (D.C. Cir. 1973). Whenever a contemplated new policy or major change in the funding of environmentally significant federal programs crystallizes into an agency budget "proposal," it must receive the internal NEPA review assured through the EIS. *See Kleppe* v. *Sierra Club*, *supra*. The Court of Appeals' standard requires no more.

II. CEQ's New Regulation Excluding "Appropriation" From the Reach of § 102(2)(C) Is Entitled To No Deference.

While NEPA imposes particular obligations on all federal agencies, CEQ is the body expressly created by NEPA to coordinate and assist the other federal agencies' efforts in implementing and promoting the purposes of the Act.[12] Pursuant to NEPA and the specific directive of Executive Order 11514, CEQ promulgated Guidelines for all federal departments, agencies, and establishments for use in preparing EISs. 36 Fed. Reg. 7724, § 1 (April 23, 1971). The current CEQ Guidelines, in effect until June 1979, date back to 1973 and specifically provide that "[t]ypes of actions covered by the Act . . . include

[12] *See* 42 U.S.C. § 4343 (creating CEQ), § 4332(2)(B) (all agencies to consult with CEQ), § 4332(2)(C) (all EISs to be filed with CEQ), and § 4332(2)(H) (all federal agencies to assist CEQ). See also CEQ Guidelines, 40 C.F.R. § 1500.1(b).

. . . [r]ecommendations or favorable reports relating to legislation *including requests for appropriations.*" 40 C.F.R. § 1500.5(a)(1) (emphasis added). Similar provisions are found in all earlier versions of the guidelines issued by CEQ. *See* 36 Fed. Reg. 7724 (1971).

This contemporaneous and long-standing interpretation of the statute by the agency primarily charged with its administration would normally be entitled to "great deference" by a court called on to construe the statute. *Udall* v. *Tallman*, 380 U.S. 1, 16, 85 S.Ct. 792, 801 (1965).[13] As this Court reiterated last Term, "an administrative 'practice has peculiar weight when it involves a contemporaneous construction of a statute by the [persons] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and

[13] CEQ's articulation of this interpretation in its Guidelines, rather than in material denoted as a "rule or regulation," does not deprive it of significance, *see, General Electric Co.* v. *Gilbert*, 429 U.S. 125, 97 S. Ct. 401 (1977), particularly in view of the Guidelines' contemporaneous adoption and the fact that every federal court to consider the question has agreed with the Guidelines' position. *Environmental Defense Fund* v. *Tennessee Valley Authority*, 468 F.2d 1164 (6th Cir. 1972), *aff'g.* 339 F. Supp. 806 (E.D. Tenn. 1972); *Aluli* v. *Brown*, 437 F. Supp. 602 (D. Hawaii, 1977); *Sierra Club* v. *Froehlke*, 359 F. Supp. 1289, 1361 (S.D. Tex. 1973), *modified on other grounds*, 499 F.2d 982 (5th Cir. 1974). CEQ's position has been that its Guidelines were binding on all federal agencies, see 43 Fed. Reg. 55,978 (Nov. 29 1978), and numerous lower courts have held that the Guidelines are entitled to substantial deference in interpreting the statute. *See, e.g., Carolina Action* v. *Simon*, 389 F. Supp. 1244, 1246-47 (M.D.N.C.), *aff'd*, 522 F.2d 295 (4th Cir. 1975); *Appalachian Mountain Club* v. *Brinegar*, 394 F. Supp. 105, 120 (D.N.H. 1975). This Court itself has looked to CEQ's Guidelines for guidance on other issues relating to an agency's compliance with NEPA. *See, Vermont Yankee Nuclear Power* v. *NRDC*, 98 S. Ct. 1197, 1216 (1978). Finally, this particular guideline was adopted as a regulation by other federal agencies including the Department of Interior, *see* Department of Interior Manual § 516.5, 36 Fed. Reg. 19344 (Oct. 2, 1971).

new.' *Norwegian Nitrogen Products Co.* v. *United States*, 288 U.S. 294, 315, 53 S.Ct. 350, 358 (1933)." *Zenith Radio Corp.* v. *United States*, 98 S.Ct. 2441, 2445 (1978).

While recognizing this general rule of reliance on agency interpretation as an aid to construction, the government asks this Court to ignore this contemporaneous construction of eight years' standing in favor of a new and directly contrary agency position first proposed after the Court of Appeals decision in this case and issued as a final rule only after the petition for certiorari was filed in this Court. Although the Society agrees that CEQ's interpretations of NEPA generally are entitled to substantial deference on questions of statutory construction, the circumstances surrounding this particular interpretation suggest that it should be disregarded by the Court.

The deference ordinarily accorded to an agency's interpretation of the statute it administers is more limited when the agency takes a position inconsistent with its prior and more contemporaneous interpretation. *Espinoza* v. *Farah Manufacturing Co., Inc.*, 414 U.S. 86, 93-94, 94 S.Ct. 334, 339 (1973). Indeed, the courts have frequently "declined to follow administrative guidelines . . . where they conflicted with earlier pronouncements of the agency. *United Housing Foundation, Inc.* v. *Forman*, 421 U.S. 837, 858-59, n.25, 95 S.Ct. 2051, 2063-64 (1975)," *General Electric Co.* v. *Gilbert*, 429 U.S. 125, 143, 97 S.Ct. 401, 411 (1976). *See generally, Sanford's Estate* v. *C.I.R.*, 308 U.S. 39, 60 S.Ct. 51 (1939). The government seeks to justify CEQ's about-face as a reasoned exercise of administrative discretion prompted by "'new developments or [a] reconsideration of the relevant facts and its mandate.'" Brief for the United States at 44, *quoting from American Trucking Association* v. *Atchison, Topeka & Santa Fe Railway*, 387 U.S.

397, 416 (1967).[14] As *ATA*, and the other cases relied on by the government make clear, however, "an agency changing its course must supply a reasoned analysis," *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970), *cert. denied* 403 U.S. 923 (1971). *See, Skidmore* v. *Swift Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 164 (1944). That reasoned analysis is completely lacking in this instance.

CEQ's "Janus-like" about-face, *Vermont Yankee Nuclear Power* v. *NRDC*, *supra*, 98 S.Ct. at 1209 n.15, was first signalled in proposed regulations published June 9, 1978, three weeks after the Court of Appeals' decision. The commentary to the proposed regulations did not even

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[14] Neither *American Trucking Association, supra,* nor *Automobile Club* v. *C.I.R.*, 353 U.S. 180, 77 S. Ct. 707 (1957), the two Supreme Court cases cited in Brief for the United States at 44, supports the Government's position here. The *Trucking Association* case involved a change in the ICC's twenty-five year old policy of requiring railroads' consent to truckers' use of certain facilities, based upon "changing needs and patterns of transportation." 387 U.S. at 416. CEQ has failed to identify any changing needs or patterns that would justify its dramatic about-face. Moreover, *Trucking Association* involved an area in which Congress had directed by the very broad and general language of the statute that the agency exercise its discretion in a quasi-legislative fashion, as distinct from the more purely interpretive issue of statutory construction involved here.

Automobile Club v. *C.I.R.* considered whether the doctrine of equitable estoppel barred the IRS from correcting a legal mistake made in issuing an exemption ruling by collecting taxes due from years past. Its holding does not seem to bear on a change in administrative policy purportedly justified by the agency's experience in administering the Act. Of the remaining cases cited by the Government on this point, only one, *Chisholm* v. *FCC*, 538 F.2d 349 (D.C. Cir.), *cert. denied*, 429 U.S. 890 (1976), involved a complete reversal of position. The majority's reasoning in upholding that change rested on its perception that the new interpretation was more consistent with the legislative history than the prior one. Since the prior CEQ interpretation is more consistent with the legislative history of NEPA, for reasons set forth in the Brief of Respondents, the *Chisholm* case is in no way inconsistent with the view that the CEQ's earlier interpretation was correct.

allude to the possibility of excluding "appropriations" from the prior definition of "legislation." 43 Fed. Reg. 25230 *et seq.* In a footnote on page 25245 of the Proposed Rules, CEQ stated that:

> [T]he council in consultation with OMB had been prepared to propose this [new] wording . . . for comment. Thereafter, *Sierra Club* v. *Andrus*, (D.C. Cir. No. 75-1871, May 15th, 1978) was decided. We would appreciate comment on the implications of that case for these provisions.

No analyses, explanations, justification or statement of purpose accompanied the proposal.

In the final rules and regulations issued November 29, 1978, and effective July 30, 1979, the CEQ offered the following as the sole justification for this major change:

> On the basis of traditional concepts relating to appropriations and the budget cycle, considerations of timing and confidentiality, and other factors, the Council decided not to alter the scope of this provision. *The Council is aware that this is the one instance in the regulations where we assert a position opposed to that in the predecessor Guidelines.* Quite simply, the Council in its experience found that preparation of EIS's is ill-suited to the budget preparation process. (Emphasis added). 43 Fed. Reg. 55989.[15]

This brief statement does not contain the "reasoned analysis" that is essential before a court will defer to an agency's interpretation that conflicts with an earlier,

[15] Although a minor point, the government is inaccurate in stating that CEQ noted that no appropriations EISs had ever been filed. Brief for the United States at 42 n.32. What CEQ stated is that some persons *commenting* on the proposed change had noted that no such EIS was filed. *See*, 43 Fed. Reg. at 55989. The inaccuracy is demonstrated in the Government's Brief in the Court of Appeals where, at p. 16 n.6, it states that the Bonneville Power Administration within the Interior Department had prepared EISs in connection with its annual appropriation requests.

contemporaneous interpretation. The Council wholly fails to explicate what "traditional concepts relating to appropriations in the budget cycle" are involved, why they preclude submission of an EIS, or indeed, why the preparation of EISs is "ill-suited" to the budget process. The absence of explanation is particularly striking because the new regulations provide for great flexibility in timing, permit confidential portions of EISs relating to classified data to be withheld, and establish a wholly separate procedure for EISs that accompany legislative proposals specifically designed to accommodate Congressional schedules. *See* CEQ Regulations at § 1501.8 (each agency to set own time limits for NEPA process); § 1506.8 (EIS on "proposal for legislation" need not comply with other regulations); § 1507.3(c) (nondisclosure of classified material in an EIS). Thus, while CEQ has shown itself capable of regulating with the requisite degree of flexibility in this area, it offers no reasoning whatsoever for the conclusion that no degree of administrative flexibility can accommodate the requirements of § 102(2)(C) of NEPA in the budget process.[16]

In view of these factors, particularly the fact that this is the *only* instance in which the Guideline's position was reversed in the new Regulations, no deference should be accorded this recent interpretation of NEPA's applicability to requests for appropriations. The circumstances surrounding CEQ's abrupt about-face, together with the cryptic nature of the agency's purported justification for the change, provide strong "danger signals" that the new change in policy is not well-founded. *Greater Boston T.V. Corp.* v. *FCC*, *supra*, 444 F.2d at 851-52. By contrast, CEQ's contemporaneous adoption nine years ago of the

[16] The absence of reasoning is particularly disturbing because the agency's change in position concerns a fundamental aspect of the statute, rather than a question of procedural detail more customarily left to an agency's discretion within broad statutory parameters.

position, amply supported by the legislative history, that the budget process was not excluded from the reach of § 102(2)(C), should be accorded substantial weight.

III. The Court of Appeals' Holding Will Not Interfere With the Current Budget Process Or the President's Exercise of His Executive Functions.

The government attempts to sketch a parade of horribles that would allegedly result from affirmance of the ruling below. First, it suggests that it is "questionable" whether there is enough time in the budget cycle to prepare an EIS, or indeed, whether an EIS could be prepared at all. Brief for the United States at 43-48 & n. 36. Second, it is suggested that the Court of Appeals holding "threaten[s] the essential political discretion exercised by the President" by compelling disclosure of predecisional agency documents. Brief for the United States at 50. Finally, the government urges that any requirement that an EIS accompany an agency's budget request would "raise serious constitutional questions" by "impos[ing] procedural restrictions on the information the President may receive from executive agencies in the performance of his discretionary and political responsibilities for the Budget." Brief for the United States at 32-33.

At the outset, it is important to emphasize what is and is not involved in this case. Many of the government's arguments—particularly those relating to the burdens of time and paper work upon the budget process—would have been more appropriately raised as objections to the District Court's holding that *all* annual budget requests for environmental programs be accompanied by an EIS. *See, e.g.*, Brief for the United States at 47. That holding is no longer at issue, however, for the Court of Appeals reversed the District Court's grant of declaratory relief and held that an EIS for budget requests is

required only under the limited circumstances described earlier. Thus, the Court of Appeals holding requires that each agency, in the approximately ten-month process of preparing its requested budget before sending it to OMB, identify any major changes in proposed budgeting or policy that would have significant environmental impact; consider and analyze the environmental consequences and alternatives to these decisions, if any; and put in writing its conclusions concerning these matters. This report—the Environmental Impact Statement—would then accompany the agency's budget request on its path to OMB, the President, and ultimately, the Congress. Finally, the EIS would be "made available to the public for comment in accordance with the procedures of 5 U.S.C. § 552 [The Freedom of Information Act (FOIA)]." 42 U.S.C. § 4332(2)(C). It is within this context, and *not* that of the district court's holding, that the government's objections must be evaluated.

A. Timing and Practicability.

As this Court noted in *Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma, supra,* NEPA imposes a duty on all federal agencies to comply with its mandate "to the fullest extent possible." NEPA does not, however, repeal by implication other federal statutes, and thus where there is a "clear and unavoidable conflict in statutory authority," the requirements of NEPA must yield. 426 U.S. at 788, 96 S.Ct. at 2438. But this exception to NEPA requires more than mere administrative difficulty or burden, lest Congress's clear intent to impose a "duty . . . upon the agencies to consider environmental factors" be frustrated. *Ibid. See e.g., Texas Comm. on Natural Resources* v. *Bergland,* 573 F.2d 201, 207-08 (5th Cir. 1978); *Concerned About Trident* v. *Rumsfeld,* 555 F.2d 817, 823 (D.C. Cir. 1976); *cf. Gulf Oil Co.* v. *Simon,* 502 F.2d 1154, 1157 (Temp. Em. Ct. of Appeals 1974). The statutory duty of compliance "to the fullest extent possible" mandates ad-

herence to NEPA's procedural directives "*unless* the existing law applicable to such agency's operations expressly prohibits or makes full compliance with one of the directives impossible." 115 Cong. Rec. 39703 (1969) (House conferees) (Senate conferees) *id.* at 40417-18, *quoted in Flint Ridge Development Co.* v. *Scenic Rivers Ass'n of Oklahoma, supra,* 426 U.S. at 788, 96 S Ct. at 2438; *Calvert Cliffs' Coordinating Committee* v. *AEC, supra,* 449 F.2d at 1114; *Environmental Defense Fund* v. *Corps of Engineers,* 492 F.2d 1123, 1131 (5th Cir. 1974).

In *Flint Ridge* this Court was faced with an absolute statutory requirement that HUD permit a registration statement under the Interstate Land Sales Full Disclosure Act to become effective within 30 days unless certain specified findings were made. Reconciliation of this statutory mandate and the NEPA requirements was impossible. The government here fails to point to a single statutory requirement imposing a comparably strict time limit on agencies' involvement in the budget process that would render compliance with NEPA impossible. Indeed, the contrast between the ten-month process that agencies undergo to prepare their budget and the 30-day period involved in *Flint Ridge* would of itself belie such an argument.[17]

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[17] Where several agencies are involved in approving a proposal, one agency is designated the "lead" agency and assumes primary or sole responsibility for the EIS. CEQ Guidelines, 40 C.F.R. § 1500.7; CEQ Regulations at § 1501.5, 43 Fed. Reg. 55992-93. Thus, only one agency would be responsible for preparing an appropriations EIS under the Court of Appeals holding—in this case, the Interior Department. That agency undergoes an extended process of intra-agency consideration of budgetary needs, which involves the preparation of "program strategy" papers by bureau chiefs and of "secretarial issue papers" by the assistant secretaries months before the budget request is submitted to OMB. See Brief for the United States at 9. The fundamental issues and contemplated changes doubtless emerge in this process with sufficient clarity to permit work to begin on an EIS in time to allow its submission to OMB in accordance with existing schedules for budgetary submission.

On close examination, it is apparent that the government does not even attempt to meet the *Flint Ridge* standard. It makes no effort to show that it would be impossible for agencies to fulfill their statutory duties under the Budget and Accounting Act and at the same time comply with NEPA. Instead, the government presses the notion that the procedural and substantive requirements of § 102(2)(C) lack the flexibility needed to deal appropriately with the unique circumstances of the budget process, and accordingly, that compliance with NEPA would be difficult. This line of argument does not advance an accurate description of § 102(2)(C), and it certainly is not sufficient to excuse compliance with NEPA.

Although the federal courts have been vigilant in assuring agencies' compliance with NEPA's procedural requirements, they have also recognized that NEPA is "not a straight jacket," *Scientists' Institute for Public Information* v. *AEC,* 481 F.2d 1079, 1092 (D.C. Cir. 1973), and "does not intend to impose an impossible standard," *EDF* v. *Corps of Engineers, supra,* at 1131. *Accord, NRDC* v. *Morton,* 458 F.2d 827, 837 (D.C. Cir. 1972); *State of Louisiana* v. *F.P.C.,* 503 F.2d 844, 865-77 (5th Cir. 1974). The more flexible approach found in the new CEQ regulations, on which the government so heavily relies in discussing whether an EIS is required at all, demonstrates that the timing requirements of the budgetary process—however pressing—do not pose a conflict with the basic statutory requirements of NEPA.

The absence of a "clear and unavoidable" conflict is illustrated by CEQ's adoption of a more lenient rule governing the preparation of an EIS accompanying a proposal on legislation than that applicable to an EIS prepared to accompany a major federal action. The requirement for a draft EIS followed by a final EIS,

while retained for proposals on "major Federal action," has been eliminated for such statements when they accompany legislative proposals. In recognition of the difficulties created by the agencies' lack of control over Congressional hearing schedules and decisions, § 1506.8 of the regulations provides that, except in limited circumstances, the transmittal of a single legislative EIS to the Congress and to federal, state and local agencies and the public for review and comment is all that is required. 43 Fed. Reg. 56001-02.[18] Further, in recognition of the frequent need to transmit legislative proposals to Congress on an urgent basis and without advance warning, CEQ has provided that the EIS need not accompany the legislative proposal but may follow it within thirty days. *Id.*[19] The government offers not a single reason why a similarly flexible approach could not be tailored to any unique requirements of the budget process and implemented under the Court of Appeals' holding.[20]

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[18] The regulation also provides that no "scoping process" need be had for a legislative EIS, and that "[c]omments on the legislative statement shall be given to the lead agency which shall forward them along with its own responses to the Congressional committees with jurisdiction," § 1506.8(b)(1), (c), 43 Fed. Reg. 56001-02.

[19] CEQ explained that "legislative proposals [are] different from proposed actions to be undertaken by agencies in several important respects . . . . [T]he timing of critical steps . . . is not under the control of the administrative agency. Congress will hold its hearings or take its votes when it chooses, and if an EIS is to influence those actions, it must be there in time. . . . Administration proposals are considered alongside other proposals introduced by members of Congress and the final product, if any, may be substantially different from the proposal transmitted by the . . . agency. . . . [Thus], the Council determined that it would be overly burdensome and unproductive to require draft and final [EISs] for all legislation . . . [Since] proposals are often transmitted on an urgent basis . . . the Council [provided] for a period of 30 days for transmittal of legislative environmental impact statements." 43 Fed. Reg. 55988 (Nov. 1978).

[20] Whether an appropriations EIS were regarded as a proposal for "legislation" or for "major Federal action" CEQ could treat it as *sui generis* for purposes of regulations relating, *e.g.*, to the need for a draft EIS; the length of any comment period; or the timing of public relase, since § 102(2)(C) itself is silent on these matters.

The government's suggestion that an appropriations EIS could not be prepared regardless of how much time were involved, Brief for the United States at 48 n.36, is baseless. Following judgment in the district court in this very case, the government issued an environmental impact statement that focused on broad funding levels and the effect of those budgetary options on the Fish & Wildlife Service. The Court of Appeals found that this programmatic EIS met any NEPA requirements. 581 F.2d at 904, 906. The government's argument that such an EIS could not be prepared is thus belied by its own actions in this very case.

B. Confidentiality.

The government's argument that the need for confidentiality in the budget process would be threatened by subjecting that process in any way to NEPA requirements founders on a number of points. Primary among these is that NEPA's requirement that EISs be made available to the public is expressly conditioned upon the requirements of the FOIA. NEPA provides that "Copies of such statement and the comments and views of the appropriate Federal, State, and local agencies . . . shall be made available . . . to the public *as provided by section 552* of Title 5. . . ." 42 U.S.C. § 4332(2)(C) (emphasis added). Thus, to the extent that the government is correct that such EISs would constitute predecisional memoranda exempt from public disclosure under 5 U.S.C. § 552(b)(5), NEPA by its own terms would not require their disclosure. Given NEPA's clear incorporation of FOIA exemptions, this Court need not decide whether and to what extent an appropriations EIS would be exempt from disclosure. It is sufficient to find that, if exempt under FOIA, NEPA compels no different result.

NEPA does not provide, as the government seems to suggest, that if FOIA authorizes withholding a statement from the public, the agency is wholly relieved of its obligation to prepare and have the EIS accompany its proposal *within* the government. This suggestion is inconsistent with the plain language of § 102 which exhorts all agencies to comply "to the fullest extent possible," and with Congress' insistence that this provision "not be used by any Federal agency as a means of avoiding compliance with [§ 102(2)(C)]," Conf. Rep. No. 91-765, 91st Cong., 1st Sess. (1969) at 10. Given NEPA's primary purpose of requiring government decision-makers to carefully consider the environmental consequences of proposed action, an EIS must be prepared and used in the internal government decision-making proces even in cases in which some or all of that statement may not be required to be publicly disseminated.

Although NEPA itself thus provides the solution to any confidentiality problem, amicus strongly disagrees with the suggestion that such material would be entitled to be withheld entirely from the public under FOIA or under any other notion of confidentiality in government decision-making. Section 206 of the Budget and Accounting Act of 1921, 31 U.S.C. § 15, does not address the issue of confidentiality; it requires only that in the absence of a request from Congress no agency make a submission directly to Congress concerning appropriations. This is hardly the kind of clear directive required to restrict the flow of information concerning government functions to the public.[21]

Furthermore, even if FOIA's exemption for predecisional memoranda were found applicable, this would not justify withholding the entire document from the

[21] The government in any event makes no claim that EISs would be exempt from FOIA disclosure under 5 U.S.C. § 552(b)(3). *See Administrator, FAA* v. *Robertson*, 422 U.S. 255, 95 S.Ct. 2140 (1975); 5 U.S.C. § 552(b)(3).

public. While the policy underlying the (b)(5) exemption might justify withholding the agency's specific recommendation expressed in the EIS, cf. *Environmental Protection Agency* v. *Mink*, 410 U.S. 73, 93 S.Ct. 827 (1973); *Renegotiation Board* v. *Grumman Aircraft Engineering Corp.*, 421 U.S. 168, 95 S.Ct. 1491 (1975), the factual basis of its conclusion—its analysis of the effect of its alternative funding levels on various environmentally significant programs—would be publicly available under the well-established distinction in (b)(5) FOIA claims between "factual" and "policy" matters, *see, e.g. E.P.A.* v. *Mink, supra*, 410 U.S. at 87-89, 93 S.Ct. at 836-37, and FOIA's provision requiring disclosure of "[a]ny reasonably segregable portion of a record." 5 U.S.C. § 552(b). Indeed, CEQ's regulations now provide for just such a procedure in the case of environmental impact statements prepared in part on the basis of classified information.[22]

Specific decisions relating to the release and timing of appropriations EISs are obviously delicate ones, suitable for the considered judgment of CEQ in future rulemaking proceedings. Decisions on these matters will require, among other things, balancing the Congressional determination in NEPA that public comment would aid in the agency's decision-making process against the desirability of avoiding interference with an ongoing decision-making process in the highest levels of the Executive Branch. The important point for now, however, is that NEPA does

[22] Section 1507.3(c) expressly provides that an agency's procedures may:

> [I]nclude specific criteria for providing limited exceptions to the provisions of these regulations for classified proposals. . . . [E]nvironmental impact statements which address classified proposals may be safeguarded and restricted from public dissemination. . . . These documents may be organized so that classified portions can be included as annexes, in order that the unclassified portions can be made available to the public.

not preclude the CEQ and other agencies from taking a flexible approach to this problem that will assure confidentiality where it is required.[23] That is all this Court need decide. Since there is no "clear and unavoidable conflict" in this regard, the government's argument that the agency is wholly relieved from NEPA's obligations must be rejected.

C. Separation of Powers.

Finally, the government suggests that reading NEPA to require an agency to prepare an EIS on budget requests will interfere with the President's ability to communicate effectively with his Cabinet and with the Congress and thus poses constitutional difficulties that could be avoided simply by reading the budget process out of NEPA. This position is wholly without merit, as is demonstrated in the Brief for Respondents and the Brief of the National Wildlife Federation and Defenders of Wildlife as Amici Curiae.

The Society would add only that while constitutional problems might arise if Congress were to prohibit a Cabinet member from communicating with the President, the requirement that an agency prepare an EIS to accompany its budget requests to OMB is not in the slightest sense a restriction on intra-branch communication.[24] An

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[23] In addition to the possibility of partial disclosure of factual aspects of the EIS, nothing on the face of § 102(2)(C) would prevent the timing of the public release of the EIS to be deferred until after the President has made his submission to Congress.

[24] The only sense in which the requirement that an agency accompany a budget request with an EIS could be a "restriction" on the provision of advice to the President is if a court were to enjoin submission of the budget to OMB pending completion of an EIS. Respondents have never sought such injunctive relief, however, and the equitable powers and jurisdiction of a federal court are more than sufficient to be able to fashion a remedy in the event of a violation that would *not* interfere in the budget process. *See, e.g., Goose Hollow Foothills League* v. *Romney*, 334 F.Supp. 877, 880 (D. Or. 1971); *Atchison, Topeka & Santa Fe Railway Co.* v. *Callaway*, 431 F.Supp. 722, 727 n.5, 730 (D. D.C. 1977); *see also Comm. for Nuclear Responsibility* v. *Seaborg*, 436 F.2d 796 (D.C. Cir. 1971).

EIS enlarges the pool of information available to federal decision-makers (including the President) without imposing limitations on the advice or opinions given.

The EIS requirement is a wholly proper exercise of Congress's constitutional law-making power, involving no greater intrusion into the domain of the Executive Branch than the requirement that heads of federal departments annually prepare requests for appropriations, 31 U.S.C. § 22;[25] that the President submit a budget to Congress by a specified date, 31 U.S.C. § 11(a); or the requirements that spell out in detail the contents of the President's budget, 31 U.S.C. § 11(a)(1)-(13). Preparation and submission of an EIS along with an agency's budget request may require additional effort by the agency but is in no way qualitatively different from these unchallenged statutory directives. If Congress can constitutionally require department heads to prepare annual

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[25] The agency's preparation and submission of a proposed budget is thus not only a recommendation to the President but a congressionally imposed duty. This distinguishes the primary case relied on by the government for the propositions that an EIS need never accompany a Presidential proposal or an "opinion" or advice given by a member of the President's Cabinet to the President, *Alaska* v. *Carter*, 12 E.R.C. 1486 (D. Ala. 1978). In contrast to the function performed by the Secretary of the Interior in the *Alaska* case, that of responding to a discrete Presidential request for advice, the Secretary has an independent statutory duty to "prepare or cause to be prepared in each year his requests for regular, supplemental or deficiency appropriations." 31 U.S.C. § 22. Moreover, preparation of a proposed departmental budget is a function that, even without Congress's express statutory directive, would have to be performed from any practical point of view by the agency to determine its own priorities. Finally, in *Alaska* v. *Carter*, numerous and detailed impact statements had been prepared concerning the withdrawal of lands; the only question decided by the District Court was whether a 30-day comment period on a draft supplemental EIS should be extended.

budgets, it additionally can require the agency to prepare an EIS to accompany those budget requests that would "significantly affect the quality of the human environment."

IV. Congressional Policy Would Be Frustrated by a Blanket Exemption of the Budget Process from NEPA's Procedural Requirements.

The Society believes that it is most important that the Court appreciate the degree to which NEPA's fundamental purposes would be frustrated should the budgetary process be wholy excluded from the statute.[26] In the court below, even the government recognized that there would be instances where the first "proposal" of a new project would occur in the agency's request for funding. *See* Govt. Br. in the Court of Appeals at 59 n.34. Given the clear thrust of NEPA to require, as early as possible, full consideration of environmental impacts and alternatives of proposed agency action and the corresponding absence of any indication in either NEPA or its legislative history that requests for appropriations were intended to be wholly exempt from its requirements, any such wholesale exclusion is totally unwarranted.[27]

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[26] It bears emphasizing that the Court need not decide whether the budget process is *wholly* exempt from § 102(2)(C). The Court is free to reject the holdings of the two courts below that requests for appropriations are proposals for legislation within the meaning of the statute and still decide that on occasion such requests may constitute proposals for "major Federal action" or alternatively, remand that issue for consideration in the Court of Appeals. *See* note 7, *supra; Dandridge* v. *Williams, supra,* 397 U.S. at 475-76 n.6, 90 S.Ct. at 1156-59, n.6.

[27] Amicus recognizes that the federal budget is limited and that on particular decisions environmental concerns may properly be secondary to other national interests. The EIS requirement, however, seeks only to identify the environmental concerns and to focus analysis on the relative environmental consequences of the decision. The importance of these functions is highlighted by recent testimony at Congressional hearings by the Executive Director of the Wilderness Society that "the confusing nature of the budget presentation for [the Park Service,]" made it very difficult to determine "how much is being expended on . . . routine facility maintenance, preservation of buildings, [and] construction of roads and bridges. . . ." The testimony also noted that the proposed budget for Park Service land acquisition had been cut from $253 to $156 million. One of the environmental consequences was that only $14.3 million for FY 1980 was requested for completion of the Appalachian Trail, notwithstanding an authorized amount of over $45 million. Given the "expected escalation of land values" in the relevant states, that budget decision could result in much higher costs to protect the Trail, if indeed the opportunity were not altogether lost. Testimony of William A. Turnage before the Senate Appropriations Comm. on the Department of Interior and Related Agencies (March 6, 1979) at 1-2.

The government's contorted efforts to escape from the clear language, scope and purpose of NEPA should be rejected. While it may be difficult for federal agencies to prepare environmental impact statements even in the limited circumstances under which they would be required under the Court of Appeals holding, this difficulty arises not so much from considerations of timing, but rather from the fact that, as far as the record reflects, budget requests may not be made on a program-by-program basis.[28] Far from justifying abandoning the EIS requirement, the absence of programmatic consideration of the environmental consequences of the budget process emphasizes the importance of the EIS, which Congress intended to be its primary procedural sword in enforcing NEPA's substantive mandate.

In any event, considerations of administrative convenience are more properly addressed to Congress than to this Court. Despite the government's effort to portray the Court of Appeals' holding as an intrusion into the legitimate affairs of other branches of government, we

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[28] In its Court of Appeals Brief, at 39, the government stated that "the Refuge System is not a separate line item in the Budget or in appropriations," and seems to indicate that it was the preparation of the programmatic EIS issued after judgment in the District Court that caused the Department to prepare a "break-out showing refuge funding for fiscal years 1974-1975."

submit that it is the government that seeks to have this Court frustrate the will of Congress. Just as the Court in *Tennessee Valley Authority* v. *Hill*, 98 S.Ct. 2279 (1978), recognized its obligation to adhere to the plain language of the Endangered Species Act despite the government's arguments that it would produce an "absurd" result, so too should the Court adhere to the plain language and policies of NEPA in spite of the government's prophecies of the difficulties of compliance. As the Court in *TVA* v. *Hill* emphasized in explaining its holding that an injunction should have issued to restrain operation of the dam:

> Our system of government is, after all, a tripartite one, with each Branch having certain defined functions delegated to it by the Constitution. While '[it] is emphatically the province and duty of the judicial department to say what the law is,' *Marbury* v. *Madison*, 5 U.S. 137, 177, 2 L.Ed 60 (1803), it is equally—and emphatically—the exclusive province of the Congress not only to formulate legislative policies, mandate programs and projects but also to establish their relative priority for the Nation. *Once Congress*, exercising its delegated powers, *has decided the order of priorities in a given area, it is for the Executive to administer the laws* and for the courts to enforce them when enforcement is sought. (Emphasis added.) 98 S.Ct. at 2301.

These words apply with particular force here. The courts' "individual appraisal of the wisdom or unwisdom of a particular course selected by Congress" must be put aside, "once the meaning of an enactment is discerned and its constitutionality determined." 98 S.Ct. at 2302. NEPA manifests a clear intention that all federal agencies making proposals for any major federal action, including certain budget requests, undertake the kind of serious analysis mandated by § 102(2)(C). And Congress remains available as a source of relief to federal agencies

in the event that they determine that the requirements of NEPA, even under the flexible approach represented by the new CEQ Regulations, cannot be met.

CONCLUSION

Accordingly, amicus submits that the judgment and decision of the Court of Appeals should be affirmed.

Respectfully submitted,

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March 28, 1979